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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Section 309(j)) PP Docket 93-253
of the Communications Act -)
Competitive Bidding)

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**PETITION FOR RECONSIDERATION OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION**

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SUMMARY

In its efforts to develop an auction design which fosters maximum designated entity participation in broadband PCS auctions while protecting against abuses of the designated entity incentives, the Commission has inadvertently foreclosed opportunities for legitimate small businesses to fully participate in the broadband PCS business.

On reconsideration, the Commission should liberalize its rules in the following ways:

- permit designated entities and other entrepreneurs to transfer 5 MHz of their spectrum directly after license grant or within one year of commencing service;
- increase the threshold percentage of passive voting equity permitted in all corporate applicants to 25%;
- liberalize the control group requirements for small companies;
- prescribe specific dates from which to measure certain of the entrepreneurs' blocks eligibility requirements.

These relatively limited actions will ensure more complete participation in broadband PCS by bona fide applicants without endangering the delicate balance the Commission is seeking to achieve.

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The Cellular Telecommunications Industry Association ("CTIA"), by its attorneys, respectfully submits its petition for reconsideration of the Commission's Fifth Report and Order in the above-captioned proceeding.¹

The PCS Broadband Auctions Order, which was adopted in June, 1994, establishes the overall framework for awarding over 2000 broadband PCS licenses through competitive bidding. In addition to adopting a general auction design, relevant bidding procedures and regulatory safeguards for broadband PCS, the Order also reserves two frequency blocks, i.e., the entrepreneurs' blocks, for designated entity and other smaller business participation. In fashioning a set of eligibility requirements and incentives applicable to entrepreneurs' blocks applicants, the Commission must necessarily strike a careful balance between encouraging

¹ Competitive Bidding, Fifth Report and Order in PP Docket 93-253, FCC 94-178 (rel. July 15, 1994) ("PCS Broadband Auctions Order"). CTIA has participated extensively in this proceeding.

maximum designated entity participation and ensuring that only qualified entities take advantage of the significant incentives. It is the point at which this balance is struck that CTIA seeks reconsideration.

I. THE COMMISSION SHOULD PERMIT ALL PCS LICENSEES TO FREELY TRANSFER 5 MHZ OF SPECTRUM AT ANY TIME AFTER LICENSE GRANT

CTIA urged in its petition for further reconsideration of the broadband PCS rules,² that all PCS licensees, including entrepreneurs and designated entities, should be permitted to transfer 5 MHz of spectrum immediately after license grant. Alternatively, transfer should be permitted within one year after service is initiated by a new PCS entrant in the relevant PCS service area. Therefore, the Commission, on reconsideration, should liberalize its transfer restrictions³ in the entrepreneurs' blocks.⁴

To ensure that spectrum is used to its fullest economic value, CTIA previously proposed that incumbent wireless firms be permitted to acquire up to 40 MHz of spectrum immediately,

² See Petition for Further Reconsideration of the Cellular Telecommunications Industry Association in Gen. Docket 90-314, filed July 25, 1994, at 6-7 ("CTIA petition").

³ Under the current rules, licensees in the entrepreneurs' blocks may not transfer their licenses during the first five years of the license term, except under very limited circumstances. See PCS Broadband Auctions Order, at ¶¶ 128-129.

⁴ Under the Commission's auction rules, the C block (30 MHz/BTA) and F block (10 MHz/BTA) have been set aside for entrepreneurs, including small businesses, women and minority-controlled companies, to bid. See PCS Broadband Auctions Order at ¶ 113, et seq.

instead of waiting until January 1, 2000; or, alternatively, to acquire an additional 5 MHz of spectrum one year after service is initiated by a new PCS entrant in the relevant PCS service area.⁵ To successfully implement this proposal, the Commission must modify its transfer restrictions for the entrepreneurs' blocks as well.

Retention of this restriction on transfer in its current form will needlessly foreclose cellular carriers from one-third of the new PCS spectrum they may purchase to achieve their 40 MHz limit. Permitting more rapid transfer of 5 MHz of PCS spectrum in secondary market transactions, though, would provide cellular operators the reasonable flexibility to reach the 40 MHz cap.⁶

In addition to providing cellular carriers with reasonable flexibility to reach the 40 MHz cap, permitting such unfettered transfers will also prospectively increase the auction value of that spectrum, will provide designated entities an additional source of funding and will ensure that market forces place spectrum in the hands of those who value it most highly -- and with little concomitant cost or risk to a competitive

⁵ CTIA petition at 6-7.

⁶ Moreover, the fact that the Commission is now exploring whether to extend geographic partitioning to women and minority-owned businesses, demonstrates that partitioning, as a concept, can have public interest benefits. See Competitive Bidding, Further Notice of Proposed Rule Making in PP Docket 93-253, FCC 94-198 (rel. Aug. 2, 1994)

marketplace.⁷ After all, the FCC has concluded that 40 MHz assigned to a single firm does not threaten competition.

There is no adequate basis to restrict the transfer for an arbitrary five year period. There is no risk of cellular misconduct in the absence of market power. The rule thus must be intended to prevent shams and speculative "flipping" of specifically set-aside spectrum. But here the rule surely is overbroad and very likely to produce unintended consequences. The ability to sell 5 MHz of a larger block provides entrepreneurs improved opportunities to secure financing and to combine the necessary amount of spectrum -- and not more -- with other resources to produce the type of services they envision the marketplace demanding. That will enhance both the viability of the entrepreneurs' blocks arrangements and the extent of competition in the marketplace. To burden the secondary market with restrictions on transfers is merely to risk deadweight losses to society.

II. THE COMMISSION SHOULD FURTHER LIBERALIZE ITS ATTRIBUTION THRESHOLDS IN THE ENTREPRENEURS' BLOCKS

One week ago on its own motion, the Commission increased from 5% to 15% the threshold percentage of passive voting equity

⁷ The Commission has recently adopted an overall 45 MHz cap for ownership of CMRS (*i.e.*, PCS, cellular and SMR) spectrum. See FCC Press Release, "Regulatory Framework for CMRS Completed (GN Docket 93-252)," Report No. DC-2638 (rel. Aug. 9, 1994). Therefore, it is difficult to justify requiring cellular companies to defer five years before acquiring an additional 5 MHz of PCS spectrum in the secondary market when cellular incumbents can currently achieve the 45 MHz limit by bidding for a 10 MHz PCS license and acquiring 10 MHz of SMR spectrum.

permitted in all corporate applicants within the entrepreneurs' blocks.⁸ But this limited action is not enough. Some remaining affiliation and attribution thresholds, if not similarly relaxed, will foreclose the very entities that Congress and the Commission are encouraging to bid on and operate PCS licenses.

These requirements affect all small companies, but they especially create an undue hardship for small cellular companies. These companies, for the most part, serve rural areas and less densely populated communities. In addition, they often have capital structures at odds with the control group concept. More often than not, they were the second cellular carrier to enter their service areas and, to build their systems, much of their equity has gone to outside investors. These business realities should not inadvertently penalize businesses which have brought innovative services and economic growth to non-urban areas.

While no one could quarrel with Commission's intent to prevent shams, fronts and abuses of the designated entity incentives, certain of the Commission's rules designed to prevent abuses are so broad as to foreclose bidding opportunities for legitimate and qualified designated entities. Therefore, to ensure increased participation by designated entities, CTIA recommends two proposals to further amend the attribution rules.

⁸ The Commission's stated rationale for this action is to enhance opportunities to raise start-up capital. See Competitive Bidding, Order on Reconsideration in PP Docket 93-253, FCC 94-217 at ¶¶ 8-10 (rel. August 15, 1994) (Attribution Reconsideration Order).

First, the Commission should increase the amount of passive voting equity permissible in the entrepreneurs' blocks from the recently adopted 15% to 25%⁹ voting stock.¹⁰ As the Commission recognizes in its Attribution Reconsideration Order, investors will have little incentive to invest in an entrepreneur if they have no ability to protect their investment.¹¹ There is no a priori reason to assume that a 25% interest will convey a significantly greater risk of control than a 15% interest would. This judgment has been made repeatedly by the federal government, including, notably in the Communications Act.

Section 310(b)(4) of the Communications Act¹² reflects a Congressional judgment that, in the normal course, foreign firms will not be allowed to control radio licenses. But that policy determination did not prevent Congress from concluding that a company may hold a license and still be directly or indirectly

⁹ In any event, the Commission should clarify the apparent discrepancy in the PCS Broadband Auctions Order concerning the 25% passive equity threshold. While the Order at ¶ 158 states that the passive equity interest by a non-attributable investor must be "less than 25 percent," the pertinent rule, 47 CFR § 24.709(b)(4)(iii), permits investments of "no more than 25 percent." See also Attribution Reconsideration Order at ¶ 8 (25% or less passive equity interest).

¹⁰ Currently within the entrepreneurs' blocks, non-attributable investors can hold a 25% or less passive equity interest in an applicant (which currently includes up to 15% voting stock in a corporate applicant), assuming the applicant has a control group. See infra for a discussion of control group requirements.

¹¹ Attribution Reconsideration Order, at ¶ 10.

¹² 47 U.S.C. § 310(b)(4).

controlled by another corporation which has up to 25% of its voting stock owned by aliens. Stated differently, section 310(b)(4) demonstrates Congress' determination that the mere use of a holding company provides sufficient insulation to permit a 25% interest without undue concern that this will confer control. The Commission's current provisions for entrepreneurs' blocks applicants contain far more elaborate safeguards than the holding company requirement Congress specified for foreign investors.

Other federal agencies dealing with issues far more sensitive than those addressed here also use a 25% voting interest as the threshold for determining control. For example, the State Department requires entities operating in the U.S. which (1) manufacture or export defense materials; or (2) furnish defense services, to register with the federal government. This registration, generally required as a precondition to government grant of a license to engage in arms sales, must disclose whether the registrant is owned or controlled by foreign persons. For these purposes, control is presumed to exist where foreigners own 25% or more of the voting stock (if no U.S. entity owns an equal or larger percentage).¹³ By way of further example, in its regulation of savings and loan holding companies, the Office of Thrift Supervision defines control as representing more than 25%

¹³ See 22 CFR §§ 122.1 - 122.2.

of the voting stock.¹⁴ Therefore, the Commission, by its own rationale, should raise the threshold to 25%.¹⁵

Second, the Commission should also create a limited exception to the control group requirements within the entrepreneurs' blocks for any entity which would otherwise qualify as an entrepreneur, including small cellular operators. Currently, businesses (including attributable investors and affiliates) which cumulatively have less than \$125 million in gross revenues in each of the last two calendar years and less than \$500 million in assets when their short form application is filed, are eligible to bid for the entrepreneurs' blocks.¹⁶ Under these current rules, passive investors may invest without their gross revenues, total assets and net worth being counted toward the overall limits only if the entrepreneurs' blocks applicant has a control group wherein other individuals or entities: (1) control the applicant; (2) hold at least 25% of the

¹⁴ See 12 CFR § 583.7 et seq.

¹⁵ At a minimum, the Commission should raise the passive voting threshold to 20%. Although not directly addressing control, the prevailing financial accounting standards are instructive in this regard. They do not require separate disclosure of less than 20% interests because it is unlikely that significant influence over a firm's operating and financial policies will arise at such levels of ownership. See Account Principles Board Opinion 18, "The Equity Method of Accounting for Investments in Common Stock" (1971).

¹⁶ See PCS Broadband Auctions Order at ¶ 156 et seq. and § 24.709(a)(1) of the Commission's rules, 47 CFR § 24.709(a)(1). Moreover, no individual investor may have more than \$100 million or greater in personal net worth. Id.

equity; and (3) if a corporation, hold at least 50.1% of the voting stock.¹⁷

The Commission, in fashioning eligibility requirements to deter abuses within the entrepreneurs' blocks, appears to have unwittingly excluded existing smaller entities, including small cellular incumbents, with pre-existing capital structures not conforming to the current control group requirements. To avoid such a pernicious effect, CTIA recommends a limited exception applicable for incumbents in all BTAs beyond the top 10.¹⁸ While the proposal appears complicated, it is designed to expand opportunities in those geographic areas where securing investment capital may be more challenging. Specifically, an applicant should be eligible to bid on the C or F blocks if it:

- has a revenue stream for calendar years 1991 and 1992;
- has less than \$125 million in gross revenues for calendar years 1991 and 1992 and less than \$500 million in total assets;
- holds an FCC license, or has a pending application on file, as of January 1, 1993;
- has a control group with at least 10% equity and 50.1% voting stock (if a corporation);
- limits its non-attributable investors to a 25% passive ownership interest (including 15% of the voting interest in a corporate applicant).¹⁹

¹⁷ See PCS Broadband Auctions Order at ¶ 158 et seq.

¹⁸ This exception would neither apply to MTA blocks nor to the top 10 BTA markets. All of the other incentives for designated entity participation would continue to apply.

¹⁹ CTIA recommends that the passive voting interest threshold be increased to 20-25%.

This would create a limited exception for incumbent applicants, including small cellular carriers, having pre-existing business relationships which do not permit them to formally meet the standard control group threshold of 25% equity. It would not, however, create loopholes for larger cellular companies because their two-year revenue stream is generally larger than \$125 million. Moreover, shelf companies would not be advantaged as they would be unable to meet the two-year revenue stream or the FCC license requirement.

III. THE COMMISSION SHOULD PRESCRIBE SPECIFIC DATES FOR MEASURING THE FINANCIAL THRESHOLDS FOR ELIGIBILITY

As currently written, the time period from which to measure the \$125 million gross revenues threshold is ambiguous. There is no clear statement of the relevant point from which to measure back two years.²⁰ CTIA therefore requests that the Commission clarify that gross revenues will be measured from the two years preceding September 23, 1993, i.e., the date the Commission adopted the PCS Report and Order which comprehensively regulates PCS services.²¹ By doing so, the relevant years from which to measure gross revenues would be 1991 and 1992.

While CTIA is at once hopeful and confident that broadband PCS licensing will occur promptly, actual dates for the auctions

²⁰ See PCS Broadband Auctions Order at ¶ 156 (the \$125 million threshold is merely measured from the "last two years"); and 47 CFR § 24.709(a)(1) (references solely the "last two calendar years").

²¹ See New Personal Communications Services, Second Report and Order in GEN Docket 90-314, 8 FCC Rcd 7700 (1993).


have not yet been set. The possibility inevitably exists that the licensing process may be somewhat protracted. Therefore, CTIA recommends anchoring the threshold with a date certain in the past. Without it, there will be an inadvertent skewing of incentives for potential applicants to avoid growth. A date certain will enable firms to develop their strategies and begin to raise capital with the assurance that an unexpected regulatory delay will not affect their eligibility.

CONCLUSION

For these reasons, CTIA respectfully requests that the Commission further liberalize its entrepreneurs' blocks transfer and attribution rules as recommended herein.

Respectfully submitted,

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